

ECHO BAY RESORT

IBLA 98-184

Decided December 27, 1999

Appeal from a decision of the Las Vegas District Office, Nevada, Bureau of Land Management, denying application for a mineral material sale. (N-62278).

Affirmed.

1. Materials Act

Under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations, 43 C.F.R. Part 3600, BLM has considerable discretion to dispose, by sale or other means, of mineral materials from the public lands. A BLM decision, made in the exercise of its discretionary authority, generally will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis.

2. Materials Act

Where BLM denies a request to remove rock from sites on public land because mining and blasting rock from the sites would have impacts that could not be mitigated on an adjacent spring, a sensitive plant species, and a scenic byway, the decision will be affirmed if the appellant fails to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by the record.

APPEARANCES: Robert H. Clark, Vice President - Operations, Seven Crown Resorts, Boulder City, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Seven Crown Resorts (Seven Crown), an affiliate of Echo Bay Resort (EBR), appeals from a decision of the Las Vegas District Office, Nevada, Bureau of Land Management (BLM), dated February 12, 1998. The decision

denies EBR's application N-62278 for a mineral material sale of 14,800 cubic feet of rock from two sites alongside the Bitter Springs Back Country Byway, within 0.3 of a mile from the natural, perennial Bitter Spring.

BLM denied the request to remove rock from the Byway sites, because it found that mining and blasting rock from the sites would have impacts on Bitter Springs, the Las Vegas bearpoppy, and the Byway that could not be mitigated. BLM based this decision on unanimous recommendations by 10 BLM staff members.

In its appeal, Seven Crown does not argue that BLM erred on all issues but rather states a willingness to devise, with BLM's help, a new material removal plan that does not run afoul of BLM's concerns. 1/ In making this argument, however, Seven Crown fails to meet its burden of demonstrating that BLM erred in its conclusions that the impacts of the project as proposed are not mitigable. Seven Crown's offers to work with BLM on a modification of EBR's proposals, and commitments to avoid BLM's concerns, do not rise to the level of a contention of material error justifying reversal of BLM. Because the record does not substantiate any of the SOR's proposals to avoid impacts, we will not set aside BLM's decision.

Facts

EBR operates a marina within the Lake Mead National Recreation Area, which is administered by the National Park Service (NPS) of the U.S. Department of the Interior. On December 29, 1997, BLM received a letter dated December 26, from EBR seeking "permits and approvals necessary to secure" 14,800 cubic yards of rock from two sites on public lands administered by BLM. These sites are situated in secs. 9 and 17, T. 19 S., R. 67 E., Clark County, Nevada, along a dirt road identified as the Bitter Spring Back Country Byway, popular for recreational users. The sites are two rectangular areas (sites 1 and 2) located about 1.8 and 2.5 miles from the turn-off for the Byway from State Highway 167. Site 1 is just north of and site 2 straddles the Byway. 2/

EBR needed rock to heighten and rebuild an earthen breakwater at its marina on Lake Mead. According to EBR, the breakwater had suffered as a result of abnormally high water levels in the lake during 1997 and was

1/ "We stand ready to meet with any and all BLM representatives to hear their concerns so that we may modify the project to satisfy their needs and reverse the denial decision." (Statement of Reasons (SOR) at 3.)

2/ These sites were chosen during a site visit attended by EBR and NPS, on Dec. 29, 1997. The decision indicates that a proposed site is located in sec. 16, instead of sec. 9, of T. 19 S., R. 67 E. It appears, however, that the decisionmaker erred in construing the location of the section lines in relation to site 2, because it straddles a road segment located entirely within sec. 9. Seven Crown does not dispute the site location.

no longer capable of protecting the marina from damage caused by wind and waves. (December 26, 1997, EBR Letter at 1-2.) On December 30, 1997, EBR supplied further information and a letter from its contractor, a professional earth moving company. According to a letter from the Wesley Corporation at page 1, the "material is considered to be parietal cemented. It is anticipated that this material will require blasting in place to allow for mechanical loading." EBR's December 30 letter, at page 2, states a need to "excavate after blasting."

BLM and EBR conducted a site visit on January 21, 1998, during which final site identification took place. On February 8 and 9, 1998, two BLM managers and eight BLM staff signed a recommendation that the materials request be denied, because of the following impacts:

1. There are wild horse and burro and bighorn sheep concerns. These animals make use of Bitter Springs and are historically scared away from watering holes by heavy vehicular (large trucks hauling rock) traffic near a spring. The main access road is adjacent to the spring and the minerals sites are approximately within .3 of a mile.
2. The Bitter Spring Back Country Scenic Byway runs adjacent to and through the mineral sites.
3. Minerals site number 2 is in Las Vegas bearpoppy [(Arctomecon californica)] habitat.
4. Minerals site number 1 is made up [of] large caliche formations within .3 of a mile from Bitter Spring. It will require dynamite blasting to remove this mineral request.

(Memorandum to BLM Geologist from Assistant District Managers (ADM's), Divisions of Resources and Recreation and their Staff, Las Vegas District Office, BLM, February 9, 1998 (ADM Memorandum), at 2-3.) The memorandum concluded that, while the first cited impact to wildlife could be mitigated, each of the others could not. Id.

On February 12, 1998, BLM denied EBR's request, concluding that the aggregate damage to the public lands and resources of the mineral material sale would exceed the proposal's benefits. (Decision at 3.) BLM found that the sale would result in the payment of expected royalty to the United States of \$9,028, based on the present fair market value of the mineral material. In addition, it noted:

Material from the site would be used to repair a[n] earthen breakwater on Lake Mead National Recreation Area lands. Repair would cut down on erosion taking place due to higher than normal water levels. This would be of direct benefit to

the owner of the concession, Echo Bay Resorts. It would also protect Park Service property from potential damage. Future use of the breakwater would be as a handicapped fishing pier.

(Decision at 2-3.)

BLM held, however, that these anticipated benefits were not sufficient to exceed the likely aggregate damage to the recreational byway. Citing the conclusions of the ADM Memorandum, BLM identified the following negative impacts:

1. A direct effect on botanical and wildlife resources inhabiting the area. Mining operations would inhibit use of water resources by wildlife temporarily and would remove bearpoppy habitat.
2. A potential effect on water resources. Blasting during mining operations could cause the springs to dry up.
3. Mining would reduce the visual and intrinsic value of the area[] to other public land users.

Id. at 3. On this basis, BLM denied the request. Id.

Seven Crown timely appealed on February 25, 1998. Seven Crown contends that the adverse impacts to the public lands and resources are "over stated and easily mitigated with changes to the plan of operation." (SOR at 1.) In addition, Seven Crown responds to the three listed negative impacts identified in the BLM decision by promising to avoid impacts. With respect to the impacts on the bearpoppy and the impacts from blasting, Seven Crown responds with promises not to blast and not to mine where the bearpoppy is found. (SOR at 1-2.) With respect to the impact on visual resources, Seven Crown offers to avoid permanent impacts by taking precautions "to stay on the existing roads" and relying on the cleansing impacts of "heavy rain." (SOR at 2.)

Analysis

[1] Under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations, 43 C.F.R. Part 3600, BLM has considerable discretion to dispose, by sale or other means, of mineral materials from the public lands. See 30 U.S.C. § 601 (1994); 43 C.F.R. § 3610.1-1; Jenott Mining Corp., 134 IBLA 191, 194 (1995); Glen B. Sheldon, 128 IBLA 188 (1994). No disposal is authorized by the statute where it would be "detrimental to the public interest." 30 U.S.C. § 601 (1994); see Curtis Sand & Gravel Co., 95 IBLA 144, 160, 94 I.D. 1, 10 (1987). BLM is required, by 43 C.F.R. § 3600.0-4, to deny such a request when it justifiably "determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale." See Glen B. Sheldon, 128 IBLA at 189.

A BLM decision, made in the exercise of its discretionary authority, generally will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis. Utah Trail Machine Association, 147 IBLA 142, 144 (1999); Glenn B. Sheldon, 128 IBLA at 191. The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made. Utah Trail Machine Association, 147 IBLA at 144 (authorized use of new trail); John Dittli, 139 IBLA 68, 77 (1997) (right-of-way); Glenn B. Sheldon, 128 IBLA at 191 (mineral material sale); Larry Griffin, 126 IBLA 304, 306 (1993) (closure of existing road to motorized use). A difference of opinion is insufficient to establish error on BLM's part. Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997).

[2] Seven Crown has not met its burden in challenging any of BLM's findings. With respect to BLM's conclusion that the proposed extraction/removal operations will have a direct impact on botanical and wildlife resources inhabiting the area, Seven Crown states in its SOR at page 1:

The total project time * * * needed would be 15 to 30 days. During that period of time, we would disperse throughout the work area a number of open water containers for the wildlife in the area. The quantity and location of the water troughs would be at the direction of BLM personnel. With regards to the Bearpoppy habitat, BLM personnel could identify the areas most sensitive which could be avoided in the project.

BLM and Seven Crown appear to agree that the impact of the proposed operation on wildlife, specifically wild horses and burros and desert bighorn sheep, would be temporary. (SOR at 1; Decision at 3.) 3/ On the other hand, Seven Crown appears to differ with BLM on the impacts to the Las Vegas bearpoppy; Seven Crown states that EBR can avoid these impacts by committing not to extract rock where the bearpoppy grows.

According to BLM's Las Vegas Bearpoppy (*Arctomecon Californica*) Habitat Management Plan (HMP), February 1998 at page 1, the Las Vegas bearpoppy is identified as a "species of special concern" by the U.S. Fish

3/ The record confirms Seven Crown's view that the impacts to wildlife are potentially mitigable. According to the ADM Memorandum at pages 2-3, BLM staff proposed various forms of mitigation of these impacts including restricting operations to a number of days, providing an alternate source of water in the vicinity, placing water troughs, or enclosing the spring.

and Wildlife Service under the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531-1544 (1994). Under section 6840.06(C) of the BLM Manual (Rel. 6!116 Sept. 16, 1988), with respect to "candidate species" (species formerly identified as Category 1 and 2, and reclassified as "special concern" species), BLM will "carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and * * * ensure that actions authorized * * * do not contribute to the need to list any of these species as [threatened/endangered]." See Native Ecosystems Council, 139 IBLA 209, 219 (1997); Edward R. Woodside, 125 IBLA 317, 324 (1993).

The HMP at page 1, also notes that the bearpoppy is

listed by the State of Nevada Division of Forestry as critically endangered and as such is protected under Nevada Revised Statute 527.270. It is listed by the Northern Nevada Native Plant Society as threatened (Morefield and Knight, 1991) and is ranked as "imperiled", both globally and in the state, by the Nevada Natural Heritage Program.

Under section 6840.06(E), BLM Manual (Rel. 6!116 Sept. 16, 1988), BLM must "carry out management for the conservation of state listed plants and animals," and "the State Director will develop policies that will assist the State in achieving their management objectives for those species."

The record demonstrates that the proposed mining sites are located "within very dense Las Vegas bearpoppy habitat." (ADM Memorandum at 1.) A map entitled "Proposed Echo Bay Operation" identifies the eastern site 2 as located entirely within bearpoppy habitat, and affecting at least 3 surveyed bearpoppy sites. 4/ The map indicates that the majority of the western site 1 is within this habitat area and the mining site covers one or more surveyed sites. See also HMP, Figure 5, Bitter Spring Map. In listing "[o]ccurrences of *Arctomecon californica* on BLM lands," Appendix 2 of the HMP lists all of secs. 9 and 17 in the Bitter Spring area.

Thus, while Seven Crown asserts that "BLM personnel could identify the areas most sensitive which could be avoided," (SOR at 2), the HMP and BLM maps "identified" that the entire site 2 and part of site 1 contain

4/ With respect to site 2, the ADM Memorandum concluded that such operations would directly affect both individual plants and plant habitat. Pictures in the record show the bearpoppy growing from cracks in the top of the rock structures on site 2. The ADM Memorandum at page 2, concluded that impacts on the bearpoppy on site 2 are "not mitigatory. The removal activity would directly impact and * * * remove bearpoppy plants and habitat. This is inconsistent with the Las Vegas Bearpoppy Habitat Management Plan and the Bureau's policy and direction (Manual 6840)."

occurrences of bearpoppy. Something more than Seven Crown's offer to do no harm is necessary to meet an appellant's burden of demonstrating, by a preponderance of the evidence, that BLM committed a material error in seeking to protect the identified sites. Seven Crown does not elucidate how EBR's plans could go forward and also avoid the habitat and sites. This Board will not speculate at what might save both the bearpoppy habitat and plant sites and EBR's plans, or set aside BLM's decision when the record supports it.

Seven Crown fails to challenge BLM's second finding of potential long-term impacts on the spring from blasting. Instead, it states: "[w]e recognize BLM's concern. We will not blast for material any time during the project." (SOR at 2.) This assertion, made for the first time in writing in the SOR, validates "BLM's concern" and contradicts the facts as EBR previously presented them in writing to BLM. The letters in the record indicate that, from the beginning, EBR proposed blasting "parietal cemented" rock. (Wesley Corporation Letter, December 30, 1997, at 1; see also EBR Letter, December 30, 1997, at 2 (need to "excavate after blasting").) Pictures confirm the nature of the rock. This Board is in no position to speculate as to whether, how, or how much rock on these sites could be removed without blasting, or whether a plan to collect, without blasting, sufficient rock to build the breakwater must be expanded to include additional new territory. In endorsing BLM's stated concern, Seven Crown fails to identify any reason for this Board to reverse the decision.

With respect to BLM's third finding that mining would reduce the visual intrinsic value of the byway, Seven Crown states in its SOR at page 2:

We carefully explained to everyone involved that we would take every precaution to stay on the existing dirt roads and not impact any area that is not already in use. We would carefully correct via grading, drag units, etc., any ruts or disturbances to the road area caused by the project. It should be noted that even if a rut or visual sign of the project is left, the very next heavy rain will erase any effect we may have caused in the wash area. All of the above could be monitored and inspected continuously by BLM personnel during the entire period of the project.

Seven Crown misconstrues the nature of the visual impacts identified by BLM. The decision relies on the ADM Memorandum's discussion of the "unique and natural landforms and conditions [that] would be lost to the byways." (Decision at 1.) The ADM Memorandum (at page 2) concludes that the visual resources of the Byway would be "irreparably impacted" and the result is "not mitigatory." "The areas mined are unique and quite impressive desert alluvial and caliche landforms whose natural conditions would be lost to the byways (waterfalls, bluffs etc.). They would be replaced with an unnatural landscape and essentially a mining/pit site." Id.

Thus, BLM's concern is that removal of the rock formations will permanently alter the landscape and destroy the "intrinsic value of the area[] to other public land users." (Decision at 3.) Pictures in the record show a dirt road winding by, through, and under rock formations. EBR admits that the byway is well-traveled by recreational users. (EBR's December 26, 1997, Letter at 2 ("well-used Byway").) A BLM Outdoor Recreation Planner submitted an analysis indicating that the byway is a "highly visited designated scenic road" which is used by "organized and commercial 4-wheel drive tours, poker [sic] rides, dual sport motorcycle self-guided scenic touring, and motorcycle hare scrambles events * * * as well as myriad casual use byway visitation." (Memorandum to Minerals Lead from Outdoor Recreation Planner, January 9, 1998.) Both BLM and the Nevada Commission on Tourism advertise the Byway as a public recreation area. 5/

Seven Crown's focus on EBR's plans to grade the road surface after material removal misses the mark. See SOR at 2. The fact that EBR will "clean up" after its operation has no bearing on the alteration to the Byway landscape resulting from rock removal. It is not clear from the record how the disturbed area would appear after mining or whether it would blend in with the surrounding landscape or generally appear to be "unnatural." (ADM Memorandum at 2.) However, it is difficult to see how reliance on correcting the "road area" and "heavy rain" will correct unnatural vistas from rock removal, or restore the value of the scenic byway to other public land users. Seven Crown has failed entirely to show that BLM abused its discretion or erred in focusing on impacts to the Byway.

We therefore conclude that BLM, in its February 1998 decision, did not improperly deny Appellant's request for the sale of mineral material, N-62278. BLM reasonably concluded that blasting was an unacceptable threat to Bitter Springs, and Seven Crown has offered nothing to refute the statement of EBR's contractor that blasting is required. BLM reasonably concluded that adverse effects to the Las Vegas bearpoppy and its habitat could not be mitigated, and Seven Crown has not shown how mining could take place without adverse impacts to individual plants or habitat. See Glenn B. Sheldon, 128 IBLA at 191. 6/ Finally, BLM reasonably rejected the application because of adverse effects on the scenic Back Country

5/ BLM's web site states: "Get off the paved road, slow your pace down, enjoy the scenery and you may be fortunate enough to spot some of the bighorn sheep that inhabit this area. This 28-mile road is an excursion through the other side of Nevada." See www.nv.blm.gov/vegas/recreation.htm. 6/ The ADM Memorandum concludes that impacts from blasting at site 1 and on the bearpoppy at site 2 cannot be mitigated. The decision denies the application for both sites on both grounds. Because the record supports potential concerns for both issues with respect to both sites and Seven Crown does not attempt to impugn the decision's logic with respect to either site, we affirm it.

Byway. By failing to address BLM's concerns that the landforms themselves would be altered by EBR's proposal, Seven Crown has not even undertaken, much less satisfied, the requirement to establish by a preponderance of the evidence that BLM's decision was erroneous.

The SOR makes clear that Seven Crown seeks to explore alternatives other than the mining proposal EBR generated for urgent review by BLM in December 1997. The record also shows that the NPS is amenable to EBR's proposal to "raise the breakwater," as long as NPS lands are not the source of the material used. (January 7, 1998, Letter from NPS to EBR.) Nothing in this affirmance should be construed as prejudicial to the companies' exploration and BLM's consideration of alternate proposals for mineral materials that would meet the concerns of all parties. The decision of this Board is final only as to the February 1998 decision. 43 C.F.R. § 4.403. It is without prejudice to EBR's presentation of a new and different proposal for a mineral material sale.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge